Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CS Docket No. 98-120
Carriage of Digital Television Broadcast Signals	)	
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

COMMENTS OF THE NATIONAL FOOTBALL LEAGUE

The National Football League ("NFL") submits these comments in response to the Commission's First Report and Order ("First Report and Order) and Further Notice of Proposed Rulemaking ("Further Notice), FCC 01-22 (released January 23, 2001). The NFL currently has thirty-one Member Clubs, whose pre-, post and regular season games are televised from August through the end of January, providing the American public with a significant amount of the most highly-rated and popular sports programming in the country. (A 32nd Member Club, the Houston Texans, will begin play in 2002.)

All of the NFL's programming appears on free over-the-air television in broadcast markets throughout the country, and one game per week is available over the ESPN national cable network. (ESPN is required by the NFL to cause this game to be aired on free over-the-air television in the home markets of the participating clubs.) Since 1994, the NFL has also offered satellite television subscribers the ability to subscribe to "NFL Sunday Ticket," which allows them to receive broadcasts of all Sunday afternoon NFL games, wherever the subscriber is located (subject to local blackouts of non-sold-out games). In addition, the NFL or its Member Clubs license content to other television programs, such as HBO's *Inside the NFL* and the local *Redskins All Access* program on WRC (Channel 4 in the Washington, D.C. area). As a result, the NFL and its Member Clubs are exceptionally interested in the future of television in the United States, including digital television ("DTV") and the mandatory carriage of DTV broadcast signals by cable systems.

The NFL is filing these comments for two reasons. First, we wish to respond specifically to those aspects of the Further Notice that ask what types of programming would constitute "program-related" material and, as such, be entitled to mandatory carriage as part of the broadcaster's primary video signal, to the extent technically feasible. Further Notice, ¶ 122; 47 U.S.C. § 534(b)(3).[1] Second, the NFL wishes to urge

[1] The NFL has received and reviewed a draft of the Comments of the NHL and the PGA Tour on this issue, and notes that the NFL's views as set forth herein are fully consistent with those Comments.

that the FCC do nothing, by way of regulation, that will trample on or affect any intellectual property rights of content owners in deciding where, when and by whom "program-related" content is to be carried.

Definition and Scope of "Program-Related"

As to the first point – what constitutes "program-related" material – both the First Report and Order and the Further Notice note that a DTV broadcast of a sporting event could enable viewing of multiple camera angles or permit viewers to select embedded information, such as sports statistics to complement a sports broadcast. First Report and Order, ¶ 57; Further Notice, 122. The broadcasts of NFL games are, of course, widely renowned for use of multiple camera angles. The NFL already itself makes available sports statistics, and is actively pursuing further opportunities to market statistics and other valuable intellectual property of the NFL. In no small measure, then, the NFL and its Member Clubs believe that DTV has great potential to facilitate exciting combinations of program-related materials – such as concurrent showing of camera angles and statistical and background information – with game broadcasts and with other broadcast programming currently licensed by the NFL or its Member Clubs. As the NFL stated in its recent comments in the ITV proceeding, the NFL fully intends to take advantage of new digital technologies, to pursue, for example, development of "NFL-related content that could be integrated with particular televised football games or other shows."[2]

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[2] Comments of the National Football League, In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, at 2 (Mar. 19, 2001) ("NFL ITV Comments").

We have two additional points to emphasize in this regard. First, with respect to the definition of "program-related," we believe that the Commission's two sports programming-related examples, noted above, provide a useful starting point. At a minimum, where there is a clear programmatic, substantive link between the primary video of the broadcast programming and the "related material," such material should be regarded as "program-related," for purposes of the mandatory carriage rules. Multiple camera angles and sports statistics associated with a broadcast, which separately or together enhance the enjoyment by the viewer of the game being broadcast or the experience of a fan, are and ought to be treated as "program-related" material.

Second, the Commission's understanding that services or information used "in direct conjunction with the programming" should be considered "program related" is, therefore, eminently sensible. First Report and Order, ¶61. We concur in the decision to adopt the *WGN* three-part test (as articulated by the Commission) for determining whether material is "program-related": 1) the broadcaster intends for the "related" information to be seen by the viewers watching the video signal; 2) such information is made available during the same time as the broadcast signal; and 3) the information must be an "integral part of the program." First Report and Order, ¶ 61 (citing *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 626 and 629 (7th Cir. 1982)).

Apart from the *WGN* test, where the copyright owner, or the licensor of the content that is included in the broadcast, is also the owner of the "related" material, and where such owner contractually obligates the broadcaster to air, or authorizes the

broadcaster to create, such material concurrently or in tandem with the broadcast, the intentions of the copyright owner are unmistakable and it is evident that such material is "program-related." In this circumstance, the content owner itself has made clear that the broadcast program and the additional material are "related" and, therefore, unless the content owner contractually restricts the broadcaster's distribution of such material, the broadcast and related material are both entitled to mandatory carriage.[3] We next consider the Commission's request for comment on the relationship between "program-related" and "ancillary or supplementary." We believe that the Commission's effort to differentiate these two concepts, to the extent that the rules rely on the distinction between free, over-the-air broadcasting and subscription services, is workable. First Report and Order, ¶59 (citing Section 73.624(c) of the Commission's Rules). The Commission has classified "data transmissions" and "interactive materials" for which a fee is charged as ancillary and supplementary services. Nevertheless, where interactive materials accompany a broadcast program, are substantively tied to the program and are free, the fact of interactivity should not disenfranchise the materials from being considered "program-related." Indeed, "interactive enhancements like playing along with a game or chatting during a TV program" (as identified in the Further Notice) should be regarded as being at the very core of future types of "program-related" material. Further Notice, ¶122. The NFL envisions that these types of enhancements, as well as e-

[3] By contrast, material that is unrelated to the programming being broadcast, that comes from different sources and that is intended to attract a different viewership, would probably not qualify as "program-related."

commerce opportunities (such as promotion or sale of NFL- or Member Club-related goods and services), might accompany a broadcast of an NFL game or other NFL-licensed programming.

Regulation Must be Crafted to Safeguard Intellectual Property Rights

As to our second basic point, the NFL here, as it did in the NFL ITV Comments, wishes to emphasize the proper relationship between FCC regulation, on the one hand, and the intellectual property rights of content owners, such as the NFL, on the other. Whatever rules the Commission might adopt with respect to the scope of "program-related" material (and the consequent obligation to carry such material) must not interfere with content owners' rights, under federal and state intellectual property laws, to choose whether, when and to whom to make their intellectual property available.

In the NFL ITV Comments, we highlighted the valuable intellectual property owned by the NFL and its Member Clubs:

> The NFL, like other content owners, owns valuable copyrights sports programming, and with its Member Clubs and its affiliates (such as NFL Films) also owns trademarks and other intellectual property in the names of sporting events (such as the Super Bowl® game), the names of the Member Clubs, logos, uniforms, and an extensive video library dating back to the 1920s. These rights are subject to protection and exploitation by the content owner through private agreements under the umbrella of protection provided by federal and state intellectual property and contract laws.

The NFL and its Member Clubs own, and will continue to own, valuable intellectual property rights in "program-related" material that might, or might not, accompany over-the-air broadcast programming. The NFL may (indeed, probably will) choose to license such material to its broadcast partners for purposes of over-the-air broadcast. Such licenses might be crafted to ensure digital must-carry treatment for the "program-related" material, but they could also reflect "platform specificity" (as do the NFL's current television contracts) and provide that broadcast partners are not authorized to permit cable operators to carry such material. Alternatively, the NFL may choose not to license such material to broadcasters, but, instead, to license it directly to cable operators; in this circumstance, it should be clear that the broadcasters would have no rights to broadcast such content (or to demand that it be carried simultaneously with, or in any particular manner related to, their retransmitted signal), notwithstanding that such content may be programmatically related to the over-the-air broadcast.

However the NFL – or any other content owner – may wish to exercise its intellectual property rights,those private arrangements should be honored. They should not be disturbed or disrupted by a regulatory regime that makes the same (or some other) material aired by a broadcaster "program-related" and, gives the broadcaster's material a superseding entitlement to being carried (for free, or otherwise) on the cable system as part of the over-the-air program being retransmitted.

In short, in no event should the FCC's classification of material as either "program-related," or not, trump private arrangements that rely on intellectual property

and contract law to permit – or to foreclose – the broadcast transmission or the cable operator's retransmission of broadcast content.

The NFL believes that mandatory carriage of "program-related" material can benefit content owners, broadcasters and viewers alike. We believe that defining "program-related" along the lines already charted by the Commission will help realize this goal. At the same time, we ask that the Commission ensure that any regulation that it adopts be carefully crafted so that it does not adversely affect the ability of content owners to choose when and to whom they may license their valuable intellectual property – whether it be "program-related," or not.

Respectfully submitted,

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